

# Practice as method

## Germany's rehabilitation in and through international law

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'International law is what international lawyers do.' This statement slightly abridged taken from Martti Koskenniemi's seminal *Gentle Civilizer of Nations*, points forthright to one of international law's key characteristics: it is shaped by practice. This practice – not being a source of international law in itself without supporting *opinio juris* – is of course first and foremost set by states. On a second layer state practice is to a certain extent influenced by international lawyers – be it through their teachings, their role as legal advisers or in another way. On the other hand, however, one might be tempted to add to Koskenniemi's laconic characterization that what international lawyers do is for its part to a great extent determined by the demands of the respective domestic environment international lawyers are operating in. The relation between the state and the international lawyer therefore seems to be somehow mutually induced.

Felix Lange's *Practice-Oriented and Community Conception* – Hermann Mosler and West German International Legal Scholarship after 1945, published with Springer in 2017, focusses on this phenomenon. The book, developed from the author's PhD thesis written under the supervision of Georg Nolte, traces the origins of what is still today sometimes called the German School or German Approach to International Law. With Hermann Mosler, *inter alia* first director of the re-founded Max Planck Institute for Comparative Public Law and International Law, first German judge at the European Court of Human Rights and second German judge at the International Court of Justice, member of the Institut de Droit International and first German scholar to give the General Course at the Hague Academy of International Law after World War II, Lange chose an imminent international legal scholar as the hero of his book. Beyond all academic distinctions, however, it is Mosler's formative influence which makes him stand out as "spiritual father of today's German international law scholarship" in Koskenniemi's assessment. Thanks to Felix Lange a very much needed intellectual biography of Hermann Mosler is now available.

As the book's title already reveals, Lange assembles the thirteen chapters around the two main pillars in the Moslerian conception of international law: Praxisorientierung (Practice-Oriented) in part A and Gemeinschaftskonzeption (Community Conception) in part B. Regarding method, Lange identifies three main streams for addressing history in international: the discipline of history of science, critical legal studies, and a contextualist history of ideas approach as advertised by Quentin Skinner (16 et seq.). Lange seeks to combine these three approaches by applying a "contextualist history of science" ("kontextualisierte Wissenschaftsgeschichte", 18), which, unfortunately, is not further elaborated

on. The author wishes to “analyse the methodological and conceptual tradition in West German international legal scholarship in the context of the developments in 20<sup>th</sup> century politics” (19). This is indeed no minor undertaking, but the author handles it well. It is noteworthy, however, that chapter 8 on alternative approaches to international law in West German scholarship appears slightly foreign as their connection to the book’s core thesis is not necessarily obvious. While it is interesting to learn about Wilhelm Grewe’s historic-political alternative, Wilhelm Wengler’s theoretic-sociological alternative and Ulrich Scheuner’s philosophic-historical alternative, Lange does not explain with his clear analysis one got used to over the preceding 200 pages or so what exactly Mosler’s position on this was nor why the respective scholars preferred their method over Mosler’s practice-oriented approach. A fully developed “contextualist history of science” would have maybe laid a stronger focus on the epistemic interest of these concurring approaches, especially as they operate in the same period.

However, these minor points only criticize what is already an excellent book. It offers a rich insight on international law’s role in the young West German republic, represented by the academic life of Hermann Mosler. The author has especially to be applauded for taking the cumbersome task to consult – and in a first step identify! – the relevant primary sources, more or less hidden in 19 archives all over Germany. This work is especially noticeable throughout the entire book and an excellent example of the added value historical research has to offer for international law. The reader learns that Lange’s hero grew up in a time of fundamental change. Born in 1912, Mosler experienced not only two world wars but also the respective changes in international law they brought about. In the ruins Nazism left behind, no resources were left to contemplate on meta-questions such as the nature of international law. Instead, German international law scholars were fully occupied with practical questions, such as the status of Germany under international law (Chapter 5) or the project of “Westintegration” (Chapter 6). During his time as the head of the legal section of the German foreign office, Mosler realized that Germany’s room for diplomatic manoeuvre depended heavily on its position within the balance of power in world politics. Instead of working on great theories of international law, therefore, Mosler decided that Germany’s rehabilitation in the world community could only be achieved through a policy of small steps (204). Lange identifies in sum five key factors causing Mosler to develop his practice-oriented approach (351 et seq.). To be highlighted is especially his socialization at the Kaiser-Wilhelm-Institute whose founding purpose was to assist the German Government in the long-term project of regaining political equality after the Treaty of Versailles, together with the lasting impact of the discreditation of theoretical approaches to international law by the Nazis and the proven utility of international law for communicating with the allies.

Interestingly, the aforementioned rehabilitation of Germany on the international stage somehow materialized in the very person of Mosler himself, when he was invited as the first non-emigrated German to give the General Course at the Hague Academy of International Law in 1974 and elected as Judge to the International Court of Justice in 1975. This is where the book’s subtitle (Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945) kicks in: according to Lange, Hermann Mosler was not only one of the most prominent German

international legal scholars, it was also him who “shaped German international legal scholarship” (351). To make this strong claim more convincing, it would have needed some practical examples: if Mosler was of this crucial importance, is his legacy still visible today? And if so, where? Finally, to push this line of thought even a bit further: did Mosler then even (willingly?) create a certain “theory” or “school” of international law? This links back to the inherent field of tension between Lange’s combination of “practice” on the one hand and “approach” on the other.

In what Lange calls the “international phase” of his career, Mosler would continue to deal with application-oriented legal topics (“rechtsanwendungsbezogene Themen”). A judge is, in his own words, “by definition, a positivist, because he has to apply the law” and should refrain from dealing with meta-questions (233). Even when turning to a community conception in international law, Mosler did not depart from this perception. In his work on “The International Society as a legal community” he defined the material concept of an international legal community rather formalistically as “the legal aspect of international society.” In his eyes, “[i]f intercourse amongst equal subjects is to take place according to legal principles and rules – a requirement contested by no one – the totality of the members in this network of commandments and rights must be considered as a legal community” (269). As Lange convincingly shows, Mosler’s conception of international law arose out of his occupation with practice. Therefore, factual realities play an important role in the normative framework. As he put it in his Hague lecture: “a society consisting of sovereign States immensely different in size, wealth and power, must pay a price for its continuing existence by allowing the major partners a greater influence, in the form of a certain hegemonic role” (276). Unfortunately, the book has only little to say on Mosler’s position vis-à-vis the theory of international law (which somehow links back to the criticism on chapter 8 and Mosler’s opinion on the alternative approaches presented). Admittedly, the book is exactly about Mosler’s practical focus, but it seems fair to say that everyone who applies the law has a certain underlying understanding of it – even if it turns out to be one of *realpolitik*.

Intellectual biographies are immensely difficult to write as they have to navigate between the private and academic biography of the person, his or her formative experiences and the overall environment he or she is operating in. Felix Lange’s „Praxisorientierung und Gemeinschaftskonzeption“ is an impressive example of how this challenge can be mastered: carefully balanced with in-depth analysis where necessary, the book is an indispensable contribution to the historization of German international legal scholarship.

Felix Lange, [Praxisorientierung und Gemeinschaftskonzeption. Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945](#), Springer, Heidelberg 2017, 405 p., 94,99 €, ISBN 978-3-662-54218-7

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